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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

THE ROGERS PARK WATER COMPANY,
Plaintiff in Error,

vs.

JOHN B. FERGUS,
Defendant in Error.

In Error to Supreme Court of Illinois.

STATEMENT.

The transcript of record herein is somewhat voluminous, covering 104 printed pages, but in our view it will not be requisite for the court to make a critical examination of it all. We have endeavored to lighten the labor of the court by incorporating a full statement of those parts of the record in this brief and argument upon which, as we think, the issues involved in this case arise.

On the 13th day of December, 1897, John B. Fergus, the defendant in error herein, filed a petition for mandamus against the Rogers Park Water Company, plaintiff in error, in the Circuit Court of Cook County, Illinois. The portions of said petition material on this hearing al-

leged, in substance, that said Fergus was the tenant and occupant of a certain dwelling house and premises therein described, in the City of Chicago, but which premises were located in that part of said city formerly within the Village of Rogers Park, which village was November 12, 1888, and thereafter until April 4, 1893, a municipal corporation organized and existing under the laws of the State of Illinois; and that, on said last named date, said village was annexed to said City of Chicago, which is also a municipal corporation under the laws of said state, and of which said city said premises have ever since been a part.

The petition further alleged that said Rogers Park Water Company was a corporation, incorporated on or about January 24, 1889, under the laws of said state, having for the object of its incorporation to locate, construct and operate a system of water works, with all appliances for pumping and distributing water in the Village of Rogers Park in said Cook County, Illinois, and its vicinity; to own all real estate used in connection therewith; and to construct and operate all machinery and appliances to furnish electricity for light, heat and power in said locality.

That said Rogers Park Water Company did proceed to locate, construct and put in operation a system of water works, with all appliances for pumping and distributing water in said Village of Rogers Park, including water mains and supply pipes in said village laid in and along the public streets; and on or about May 9, 1897, laid a water pipe in the street in front of said premises, which pipe was connected with the pumping works of said water company, and was used to distribute water to occupants of premises along said street, and that petitioner's prem-

ises were connected by the usual water supply pipe with such water main, in which supply pipe was constructed a cock for the purpose of letting in and shutting off the water supply.

That by reason of its incorporation, as aforesaid, and the location, construction and operation of said system and the laying of water mains in the streets, said water company had become and was a common distributor of water to the inhabitants of the territory formerly the Village of Rogers Park (now included in Chicago), and held itself out as such.

That October 4, 1897, the city council of Chicago passed an ordinance which was duly approved by the mayor, in which it was ordained that the maximum rates and charges for the supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the City of Chicago in which said company had been or might be authorized to lay water mains and supply pipes was established and fixed so as to be uniform and equal in every particular with those charged by the City of Chicago for water supplied from the city water works.

That the rates due from petitioner computed on the basis prescribed as maximum rates by said ordinance, and allowing rebate for prompt payment given by Chicago, for water supplied from the city water works, amounted to $8.72 in advance, for the current half year from November 1, 1897, to May 1, 1898.

That said premises were supplied with water from said water works on and before November 1, 1897, and that the petitioner had duly tendered said sum of $8.72, and had requested and demanded that said company turn on

the said water supply to said premises, but said company refused so to do unless and until said petitioner paid $13.50 for the water supply to said premises for the half year beginning November 1, 1897.

That he was ready and willing to pay said sum of $8.72, and that said company had assumed the duty, and it was its duty, to so supply water to said premises on payment of said sum, and that petitioner had the clear legal right to such supply, and therefore prayed for a writ of mandamus to issue from said court directed to said Rogers Park Water Company, commanding it to receive said sum of $8.72 from the petitioner, and to turn on the supply of water to said premises, etc. The petition is found printed in full in the transcript of record, pp. 6–9.

The petition was duly verified, and after various proceedings, including the restoration of the files which had been lost, and which has resulted in the duplication of a large portion of the pleadings in the record, but which proceedings are not material on this hearing, certain amended answers were filed by said Rogers Park Water Company, to which the attention of the court must be invited.

We think it will be necessary to examine only the amended answer, printed in the Transcript of Record, pp. 44–56, and which was filed, by leave of court, January 28, 1898. This answer, called in the margin "3rd Ans.," alleged that the petitioner ought not to have or maintain his said action because said Village of Rogers Park, which was a municipal corporation, etc., on and before November 12, 1888, then desired to obtain a supply of water for public use, but said village was prohibited by law from raising by public taxation the

amount of money requisite to build and operate a system of water works to pump and distribute a water supply for fire protection, and for the use of the inhabitants of said village; and that, in order to obtain a supply of water for public use in the manner and form by statute provided, the board of trustees of said village, before said November 12, 1888, applied to one H. E. Keeler to build and operate a system of water works, with all appliances for pumping and distributing water in said village; and thereupon, on said November 12, 1888, the board of trustees of said village passed an ordinance entitled and in substance, as follows:

"An ordinance to provide for supply of water to the Village of Rogers Park, Illinois, and its inhabitants; contracting with H. E. Keeler, his successors and assigns, for a supply of water for public use, and giving the said Village of Rogers Park, Illinois, an option to purchase the said works.

"Be it ordained by the Board of Trustees of the Village of Rogers Park, Cook County, Illinois:

"Section 1. That in consideration of the public benefit to be derived therefrom, the Village of Rogers Park, Illinois, hereby grants the exclusive rights and privilege for the period of thirty years from the time that this ordinance takes effect unto H. E. Keeler, his successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and the said village hereby grants the exclusive right of using the streets, alleys, public squares and all other public places within the corporate limits of said village as they now exist, or may hereafter be extended, and within such other territory as may now or hereafter be under its jurisdiction, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for furnishing, storing and conducting an adequate supply of good, wholesome, clear water to the said village and to its inhabitants for public and

private use, and for making repairs and extensions to the said system from time to time, during the period in which this ordinance shall be in force."

Section 2 provides for the size and quality of mains; that hydrants for fire protection of a certain quality, etc., should be located and erected on the first five miles of mains, with gates and valves in the mains, and for pumping machinery with capacity and tests as provided, together with a stand-pipe for the storage of water.

"Sec. 3. In consideration of public benefits and the protection to property resulting from the construction of the said system of water works, the said village hereby agrees to pay an annual rental for fire protection to the said grantee, his successors and assigns, for not less than five miles of mains within the corporate limits of said village, for the aforesaid period of thirty years, at the annual rate of $575 for each mile of mains, to be payable semi-annually on the 1st days of July and January in each year. Also, the Village of Rogers Park agrees to pay all municipal or village taxes which may be assessed against the plant of the said grantee or assigns, for the first ten years the water works are operated. The rental for fire protection of mains in excess of said first five miles, as hereinafter provided, at the request of the said village shall be at the annual rate of $400 for each mile of mains, payable as aforesaid during the unexpired period of the said original term of thirty years. The rental shall begin at such time as the said grantee or assigns shall begin to maintain continuously a pressure of forty pounds per square inch. * * *"

"Sec. 4. * * * Said grantee, his successors or assigns, in consideration of the rentals herein agreed to be paid, and in consideration of rights and privileges granted, expressly agrees on it part to furnish to said Village of Rogers Park, and to the residents thereof, an adequate supply of good, wholesome and clear water, fit for culinary and drinking purposes; said

water to be taken from Lake Michigan at such a point near the north boundary line of said village as will best insure its freedom from sewage contamination, and it shall be filtered by the most modern and by an acceptable process before being delivered into the mains for supplying said village, and if said grantee, his successors and assigns, shall at any time fail to furnish a supply of water to said village and the residents thereof, of the quality and quantity provided for in this ordinance, then all rentals to be paid by said village to said grantee or assigns shall cease until said grantee or assigns shall provide and supply water of the degree of purity and in the quantity provided for in this ordinance. * * * Said grantee or assigns further agrees to furnish such steam as may be needed for running one or more air compressors to be furnished by said village and located in the pumping station of said grantee or assigns; the total power used by said air compressors shall at the outset not exceed ten horse power. All power in excess of that above provided, which said village may need for running air compressors, shall be furnished by said grantee or assigns at a cost of $75 per horse power per annum."

"Sec. 5. Upon the completion of the construction of the said system of water-works, the said grantee or assigns shall notify the board of trustees of said village to that effect, and thereupon submit the works to such a test as will show the capacity of the works to be sufficient to throw water through 100 feet of two and one-half inch hose and one-inch nozzle from each of six (6) different hydrants not located on the same main, to a height of ninety feet above the level of the ground at the Chicago and North-Western Railroad depot when the air is still. The performance of this test shall be a fulfillment by the grantee or assigns of the terms and conditions of this ordinance so far as relates to strength and capacity. Said grantee or assigns shall so maintain and enlarge said water-works that they will at all times be capable of performing such tests, and

said village board shall have the right to order a repetition of such tests annually by giving said grantee or assigns a written notice of thirty days, and a failure on the part of said grantee or assigns to make such tests shall cause a suspension of said rental of mains until said grantee or assigns successfully performs said test."

"Sec. 6. Within sixty days after the day that this ordinance takes effect, the said grantee or assigns shall file a written acceptance thereof in the office of the village clerk, and at least five thousand dollars work and material on said works shall be done and furnished before December 31, 1888. The construction of said water-works shall be commenced within sixty days after this ordinance takes effect, and said works shall be completed within one year after the commencement of the construction thereof. * * *"

Section 7 provides that said village board of trustees shall from time to time pass and enact ordinances under suitable penalties providing for the protection of said works from damage, fraud or imposition.

"Sec. 8. At the expiration of ten years after the completion of the said works and at the expiration of each succeeding period of five years thereafter, the said village shall have the right and privilege to purchase the said system of water works, provided they notify the said grantee or assigns of their intention so to do at least six months before the expiration of said period or periods of years. The value of said system shall be ascertained as follows: The said grantee or assigns and the said village shall each appoint one person, and the two appointees shall choose a third, and the three persons thus chosen, who shall be hydraulic engineers, shall constitute a board to determine the value of the said system of water works. In case the two experts chosen disagree upon the selection of the third he shall be appointed by a judge of the Circuit Court of some adjoining circuit. None of the board shall

be residents of the Village of Rogers Park, Illinois. The said board in fixing the value of said work shall take into consideration the value of the franchise, the value of water rights and right of way, the revenue from the works and all other facts and considerations legitimately connected with the said work. The said village shall within sixty days after the said board has rendered its decision pay the amount awarded in cash, and upon such payments the said grantee or assigns shall transfer to the said village all their said rights and privileges and property included in said appraisement."

"Sec. 9. The said grantee or assigns shall make extensions of mains whenever called upon to do so by the village board of the said village, provided, however, that said extensions shall not be less than 500 feet in length, and further, provided, that there shall be one consumer for each 100 feet along the line of such extension who shall agree to take water at the established rates for a period of at least two years, but as a condition of making such extensions the village agrees to pay for public fire service upon such extensions at the rate of $400 per annum for each mile of such extension for the unexpired term of this franchise and contract."

Section 10 provides for a fire pressure of sixty pounds in the mains, and right of repair is given.

Section 11 provides that said grantee or assigns shall have the right to make alter, amend and enforce rules for governing the connections with their mains, and the use of the water and for preventing waste of water.

Section 12 provides that said grantee or assigns shall charge the following annual water rates to consumers of water during the existence of this franchise and that they shall have the right at any time to insert a water meter into the service pipe of any consumer, and to charge and to collect from him at meter rates, provided that in such case the minimum annual rate to be paid by anyone shall be $5. Said rates are, in part, as follows:

Bath, private, each tub	$3 00
Dwelling houses, five rooms or less, for family	6 00
Dwelling houses, each additional room	1 00
Hose for sprinkling lawn—sixty-six foot frontage per year	5 00
Hose—each foot in excess of sixty-six feet	05
Wash basins, stationary, first basin in private family free—all others, each	3 00
Water closets, per bowl	3 00

Section 13 provides that a sufficient tax shall be levied and collected annually upon all taxable property in said village, subject by law to such taxation, to meet the payments under this ordinance as they respectively mature, during the existence of any contract for public fire service, which tax shall be irrepealable from and after the passage of this ordinance, and in case the said village shall be authorized to levy a special tax for such purpose such tax shall be annually levied and the proceeds thereof shall be kept as a separate fund to be known as the fire hydrant fund.

"Sec. 14. Within sixty days after the passage of this ordinance said H. E. Keeler, his successors or assigns, shall file with the village an acceptance of the same, which acceptance, duly acknowledged before some officer authorized to administer oaths, shall have the effect of a contract between the village and said H. E. Keeler, his successors or assigns.

"Passed November 12, A. D. 1888.

"JOHN L. HEALY,
"*Village Clerk.*

"Approved November 12, A. D. 1888.

"HENRY P. DALY,
"*President Board of Trustees.*"

This ordinance bore the regular endorsements showing its passage and is printed in full. (Tr. of Rec., pp., 44-51.)

The answer further alleged that said ordinance was duly

published and became a valid ordinance of said village. That it was then known and understood by said village. and the board of trustees that said grantee was not possessed of sufficient means to build said water works and that said ordinance was passed to enable him to negotiate with other persons on the faith of said ordinance and the agreements and stipulations therein of said village to obtain the necessary capital to build, equip and operate said water works, and that said village and said board of trustees then knew that the only means to make capital invested in said system of water works profitable and to repay the necessary investment, was the rates therein provided to be paid for a supply of water; that the territory of said village was a residence district, so that one of the main sources of revenue—it was then well known—would be the rates to be paid for domestic supplies of water.

That thereupon said Keeler negotiated with different persons to become stockholders or purchasers of bonds of said company, and that relying upon the rights and privileges contained in said ordinance, and particularly upon the rates therein provided to be paid for a supply of water, a large number of persons associated themselves together to incorporate said Rogers Park Water Company and negotiated the sale of bonds of said company to provide the necessary means.

That thereupon, said Keeler afterwards, and on or about January 8, 1889, made and filed his acceptance of said ordinance, in accordance with section 14 thereof, which acceptance is set out in full in said answer.

Said answer admitted the incorporation of said company on or about January 24, 1889, and alleged that

January 31, 1889, said Keeler duly assigned all his rights under said ordinance to said company, which became and was possessed thereof.

Said answer further admitted that said company erected and put in operation a system of water works, including pumping appliances, water mains and supply pipes, and alleged that all this had been done by authority of said ordinance and not otherwise; and said answer insisted that by virtue of the passage and its acceptance by the grantee therein named of said ordinance and by the said assignment and the acceptance thereof by said company, a contract was constituted between said company and said village.

That upon the completion of said water works, the company notified said board of trustees, and said water works were tested as provided in said ordinance and accepted by said village; and that thereafter, previous to said annexation, the hydrant rental reserved in said ordinance was paid to said company by said village, and after said annexation by said City of Chicago.

That the ninth section of said ordinance provided that extensions of mains should be made when ordered from time to time by said board of trustees; that about thirteen miles of additional mains had been ordered and laid besides the first five miles originally provided for, and making about eighteen miles in all of such mains in said territory, belonging to said company, and in service to supply water, and that a large part of such extensions had been ordered and accepted by the common council of said City of Chicago, including the main along the street in front of the petitioner's premises, which extension was ordered January 25, 1897.

That the water rates demanded from the petitioner were the same rates in and by said ordinance prescribed and not other or different rates, and that said rates of $13.50 were the lawfully established rates which the company had the right to charge and demand, and were the customary rates of the company for a like service.

That said ordinance, with the acceptance thereof, and the construction, maintenance and operation of said water works, together with the acceptance thereof by said village and the City of Chicago, as set forth, including the said extensions, constituted and was a contract between said company and said City of Chicago, which contract, together with all rights, privileges, franchises and immunities by said ordinance conferred, are the property of said Rogers Park Water Company, which is entitled to the protection of the laws of Illinois; and which contract, rights, privileges, franchises and immunities are, in like manner, under the protection of the Constitution of the United States, contained in the tenth section of the first article, which forbids any state to pass any law impairing the obligation of contracts; and of the provision contained in the first section of the fourteenth article or amendment to said constitution, which provides that no state shall deprive any person of property without due process of law; that said company therefore claims and insists that the City of Chicago was and is without any power to pass the ordinance alleged in the petition to have been passed October 4, 1897, and insists that any such ordinance, if so passed, was void, illegal and of no effect.

The answer concluded with an allegation that the petitioner was deprived of a water supply solely by reason of his refusal to pay the usual, customary and lawful charges

of the company; to which was added a formal verification.

To this answer a general demurrer was filed, which appears in Transcript of Record, pp. 57-8, and is (omitting the heading), as follows:

> "And now comes the petitioner, by Jesse B. Barton, his attorney, and says that the third amended answer of said defendant originally filed herein on the 28th day of January, 1898, as a further answer, is not sufficient in law to be pleaded to or traversed; and this he is ready to verify. Wherefore he prays judgment."

February 26, 1898, the court sustained said demurrer, and the Rogers Park Water Company elected to stand by its said answer, denominated in said order as its plea. (Printed Transcript of Record, p. 64.)

Certain issues of fact were made upon other pleadings in the case, and a trial resulted in a verdict for the petitioner and judgment on the verdict. It is only necessary to say that the questions arising upon the sustaining of said demurrer to said amended answer have not been waived nor abandoned by the Rogers Park Water Company, but the cause was duly taken by appeal from said Circuit Court to the Supreme Court of Illinois, where the judgment of the Circuit Court, awarding a peremptory writ of mandamus pursuant to the prayer of said petition, was affirmed.

A copy of the opinion of the Supreme Court of Illinois is found at pp. 97–101, Transcript of Record, and the case is reported as *Rogers Park Water Company* v. *Fergus*, 178 Ill., 571.

The assignment of errors in the Supreme Court of Illinois was as follows:

"1. Said Circuit Court erred in improperly admitting evidence upon the trial of said cause on behalf of petitioner, against the objection of the defendant.

"2. Said court gave improper instructions to the jury upon the trial of said cause at the request of the petitioner and against the objection of the defendant.

"3. Said court refused proper instructions to the jury upon the trial of said cause which were requested by the defendant.

"4. Said court improperly overruled the demurrer of the defendant to the fourth plea of the petitioner.

"5. Said court improperly sustained the demurrers of the petitioner to the first answer of the defendant.

"6. Said court improperly sustained the demurrer of the petitioner to the third answer of the defendant.

"7. Said court erred in overruling defendant's motion for a new trial.

"8. Said court erred in overruling defendant's motion in arrest of judgment.

"9. Said court erred in rendering judgment upon the verdict in favor of the petitioner and against the defendant.

"10. Said proceedings are otherwise erroneous.

"Wherefore the appellant prays that the said judgment may be reversed, etc."

The assignments numbered six, eight and nine are the ones to which we invite attention.

At the time of the passage of the ordinance of November 12, 1888, two general acts were in force in Illinois, which related to the power of municipalities to pass ordinances for water works to be built and operated by private enterprise.

The first is as follows:

"An Act entitled 'An Act to enable cities, incor-

porated towns and villages to contract for a supply of water for public use, and to levy and collect a tax to pay for the water so supplied.' (Approved April 9, 1872. In force July 1, 1872. L. 1871–2, p. 271. This title is as amended by act approved June 26, 1885, in force July 1, 1885, p. 64.)

"Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years." (As amended by act approved June 30, 1885. In force July 1, 1885, L. 1885, p. 64.)

"Section 2. Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village for the water so supplied."

The second, passed one day later and taking effect on the same day as the first, was the Cities, Villages and Towns Act. The title to that act, and the article and section bearing upon this case, are as follows:

"An Act entitled 'An Act to provide for the incorporation of cities and villages.' (Approved April 10, 1872. In force July 1, 1872. Laws of 1871–2, p. 218.)

"Article X, Section 1. The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not to exceed thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water, and injuries to such wells, pumps, cisterns, reservoirs or water works."

For illustration of the kind of use of water which the legislature had in mind, we call attention to the following act which was then in force, as follows:

> "An Act entitled 'An Act in relation to the levy and collection of taxes for sewerage and water works in the cities of this state that may have established a system of sewerage and water works for such city." (Approved and in force April 22, 1871.)

The second section contains the following language:

> "The legislative authority of any such city which now has or which may hereafter have established water works for the supply of water to the inhabitants thereof shall have power to annually levy and collect a tax upon the taxable real and personal estate of any not to exceed one mill on the dollar, for the extension of water mains or pipes therein, and the maintenance of such water works." Laws 1871-2, p. 15.

In 1891, some two years subsequent to the completion of the water works in question, the legislature enacted a statute, as follows:

> "An Act to enable cities, towns and villages incorporated under any general or special law of this state to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village and the inhabitants thereof. (Approved June 6, 1891. In force July 1, 1891, p. 85.
>
> "Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the corporate authorities of any city, town or village, now or hereafter incorporated under the general or special law of this state, in which any individual, company or corporation has been, or hereinafter may be authorized by such city, town, or village to supply water to such city, town or village and the inhabitants thereof, be and are hereby empowered to prescribe by ordinance maximum rates and charges for the supply of water furnished

> by such individual company or corporation to such city, town or village and the inhabitants thereof, such rates and charges to be just and reasonable. And in case the corporate authorities of any such city, town or village shall fix unjust and unreasonable rates and charges, the same may be reviewed and determined by the circuit court of the county in which such city, town or village may be."
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> 1 S. & C. Ill. R. S., 2nd Ed., p. 868.

This statute was not acted on by the Village of Rogers Park in any manner, but some time after its annexation to Chicago, on or about October 4, 1897, the city council of Chicago passed an ordinance as follows:

> "Section 1. The maximum rates and charges for a supply of water furnished by the Rogers Park Water Company to the inhabitants of that part of the City of Chicago in which said company has been or may be authorized to lay water mains and supply pipes are hereby established and fixed so as to be uniform and equal in every particular with those charged by the City of Chicago for water supplied from the city water works."

The rates thus fixed were considerably less than those established by the ordinance of the Village of Rogers Park of November 12, 1888, under which the works were built.

December 11, 1897, defendant in error tendered rates computed according to the ordinance of October 4, 1897, and demanded that the Rogers Park Water Company, plaintiff in error herein, turn on the supply of water to said premises. This demand was refused on the ground that the amount tendered was not sufficient, and on such refusal the petition for a mandamus was filed. The pleadings admit that the amount tendered was less than the rates fixed and permitted by the original ordinance

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of November 12, 1888, and less than the usual and customary rates charged by the plaintiff in error for like services.

The assignments of error in this court which we desire to present upon this hearing question the validity of the ordinance of October 4, 1897, passed by the city council of the City of Chicago, which ordinance reduces the maximum rates which the Rogers Park Water Company is permitted to charge for water, without its consent, below the rates for water fixed and permitted by the ordinance of the Village of Rogers Park of November 12, 1888, under which the water works of the plaintiff in error were built, and below the usual and customary rates charged by it for water.

It is insisted by plaintiff in error that the Supreme Court of Illinois committed error in holding said ordinance, passed by the city council of the City of Chicago, October 4, 1897, to be valid when said ordinance infringed the vested rights and privileges of the plaintiff in error; and that said judgment upholding the validity of said ordinance and against said rights and privileges of the plaintiff in error, which were specially set up and claimed under the constitution of the United States, was repugnant to the constitution of the United States.

Assignments of Error.

Now comes the plaintiff in error, Rogers Park Water Company, by N. A. Partridge, its attorney, this 14th day of April, A. D. 1899, and shows that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit :

I.

Said Supreme Court of Illinois erred in deciding that the authority exercised under the State of Illinois by the City of Chicago in passing the certain ordinance of the fourth day of October, A. D. 1897, was valid, and in rendering its said judgment in said cause upholding the validity of said authority, which said authority and the exercise thereof was repugnant to the constitution of the United States.

II.

Said Supreme Court of Illinois erred in deciding that the said ordinance of the City of Chicago, passed on the fourth day of October, A. D. 1897, was valid, and erroneously rendered judgment in favor of the validity of said ordinance, which said authority and the exercise thereof was repugnant to the constitution of the United States.

III.

Said Supreme Court of Illinois erred in deciding that the rights and privileges conferred upon said plaintiff in error as assignee of the grantee of said ordinance passed on the 12th day of November, A. D. 1888, by said Village of Rogers Park, were not vested rights, and erroneously entered judgment against said rights and privileges of the plaintiff in error, which were specially set up and claimed under the Constitution of the United States.

IV.

Said Supreme Court of Illinois erred in not overruling the demurrer interposed by the defendant in error to the third answer of the plaintiff in error.

V.

Said Supreme Court of Illinois erred in not reversing the order of the Circuit Court of Illinois awarding a peremptory writ of mandamus in favor of the defendant in error and against the plaintiff in error.

VI.

Said Supreme Court of Illinois erred in rendering judgment in said cause in favor of the defendant in error and against the plaintiff in error.

VII.

Said Supreme Court of Illinois erred in deciding that no contract to pay the rates for water which were charged by the plaintiff in error to the defendant in error existed between said defendant in error and the plaintiff in error by virtue of the application for water and the acceptance thereof in said record appearing, and which decision of said court impairs the obligation of said contract, in violation of the provisions of the constitution of the United States.

Wherefore the said plaintiff in error, The Rogers Park Water Company, prays that the judgment of said Supreme Court of Illinois may be reversed by this honorable court.

NEWTON A. PARTRIDGE,
Attorney for said Plaintiff in Error.

POINTS.

I.

THE VILLAGE OF ROGERS PARK HAD THE RIGHT TO CONTRACT WITH H. E. KEELER AND HIS SUCCESSORS AND ASSIGNS FOR A SUPPLY OF WATER FOR PUBLIC USE.

Said village was a municipal corporation organized under the laws of Illinois. The statutes then in force gave the municipality the right to procure a supply of water for public use.

> Act approved April 9, 1872; in force July 1, 1872. Myers' 1872 Statutes of Ill., p. 460; Starr & Curtis' R. S. Ill., 2nd Ed., p. 865.
>
> Act approved April 10, 1872; in force July 1, 1872. Starr & Curtis' R. S. Ill., Ch. 24, Art. X, Sec. 1.

The right to secure a supply of water for public use has been held to exist in a municipality as implied from the police power and to preserve health; and that such supply of water may be procured by contract as a sanitary and police regulation.

> 1 Dillon Mun. Corp., 3rd Ed., Secs. 146, 443, and cases cited.

The necessity for a supply of water and the power to procure it for the use of the municipality and its inhabitants is recognized in Illinois and throughout the entire United States.

N. O. Gas Co. v. *La. Light Co.*, 115 U. S., 650.

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

City of Quincy v. *Bull*, 106 Ill., 337, 346–352.

Wagner v. *Rock Island*, 146 Ill., 139, 153–158.

Ill. Trust & S. Bank v. *Arkansas City*, 76 Fed. Rep., 271, 281–284.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

II.

WHERE THE GRANTEE OF A FRANCHISE HAS ACCEPTED THE GRANT AND PERFORMED THE PUBLIC SERVICE IMPOSED AS A CONDITION OF THE GRANT THE FRANCAISE BECOMES A CONTRACT WHICH IS PROTECTED BY THE CONSTITUTIONAL PROVISIONS WHICH FORBID THE PASSAGE OF ANY LAW IMPAIRING THE OBLIGATION OF CONTRACTS.

2 Dillon Municipal Corporations, Sec. 691.

N. O. Gas Co. v. *La. Light Co.*, 115 U. S., 650.

Louisville Gas Co. v. *Citizens' Gas Co.*, 115 U. S., 683.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

N. O. W. W. Co. v. *St. Tammany W. W. Co.*, 14 Fed. Rep., 194.

Erie Railroad v. *Penna.*, 153 U. S., 628.

Reagan v. *Farmers'*, *etc.*, *Co.*, 154 U. S., 362.

Walla Walla v. *Walla Walla Water Co.*, 172 U. S., 1.

City of Quincy v. *Bull*, 106 Ill., 337, 346-352.

Wagner v. *Rock Island*, 146 Ill., 139, 153-158.

Even a mere license, if acted upon in so substantial a manner that to revoke it would be unjust, ceases to be a license, and becomes a valid contract.

Gregsten v. *Chicago*, 145 Ill., 451, 461-8.

Belleville v. *Citizens'*, *etc.*, *Co.*, 152 Ill., 171, 185-6.

A legislative grant becomes a contract and irrevocable after acceptance.

Dartmouth College v. *Woodward*, 4 Wheat., 518.

People v. *O'Brien*, 111 N. Y., 1.

Fletcher v. *Peck*, 6 Cranch, 87.

Von Hoffman v. *Quincy*, 71 U. S., 535.

1 Dillon Municipal Corp., Sec. 53.

Municipal grants and ordinances give rise to the same rights and are subject to the same constitutional prohibitions as other legislative grants.

Williams v. *Bruffy*, 96 U. S., 176.

N. O. Water W. Co. v. *La. Sugar*, *etc.*, *Co.*, 125 U. S., 18.

N. O. W. W. Co. v. *Rivers*, 115 U. S., 674.

St. Tammany, etc., Co. v. *N. O. W. W. Co.*, 120 U. S., 64.

Von Hoffman v. *Quincy*, 71 U. S., 535.

4 Thomp. Corporations, Sec. 5427-8, 1019.

The definition of "franchise" includes the grant of authority to dig up public streets and lay pipes therein for any public service. This has been settled by a long line of concurring authorities.

2 Dillon Mun. Corp., 3rd Ed., Sec. 691.

N. O. Gas Light Co. v. *La. Light, etc., Mfg. Co.*, 115 U. S., 650.

New Orleans v. *Clark*, 95 U. S., 644.

N. O. Water Works Co. v. *Rivers*, 115 U. S., 674.

"The right to dig up the streets and place therein pipes or mains for the purpose of conducting wate* for the supply of the city and its inhabitants * * r is a franchise, the exercise of which could only be granted by the state, or the municipality acting under legislative authority."

Haugen v. *Albina Light & Water Co.*, 21 Ore., 411, 418.

III.

THE EXPEDIENCY OF MEASURES IS A PURELY LEGISLATIVE QUESTION. WHEN RATES ARE FIXED BEFORE THE ACCEPTANCE OF THE CHARTER OR ORDINANCE, THEY BECOME PART OF THE CONTRACT AND ARE PROTECTED BY THE COTSTITUTION.

"It is insisted, however, that the owner of property is entitled to reasonable compensation for its use, even though it be clothed with a public use, and

that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice has been otherwise."

Munn v. *People, etc.*, 94 U. S., 113, 133.

"But where the legislature steps in and provides a maximum of charges, it operates upon this corporation the same that it does upon individuals engaged in a similar business. It was within the power of the company to call upon the legislature to fix permanently this limit and make it a part of the charter, and if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference; but it was not, and the company invested its capital relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation"

Ruggles v *People, etc.*, 91 Ill., 256, 264, quoting and following *Chicago, B. & Q. Railroad Co.* v. *Iowa*, 94 U. S., 155.

"Where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people."

Peik v. *Chicago & Northwestern Ry. Co.*, 94 U. S., 164, 178.

"Whenever, by accepting such privileges, the grantee becomes bound by an express or implied undertaking to render service to the public, such undertaking will uphold the grant, no matter how inadequate it may be; for, the legislature being vested with power to make grants of that character when the public convenience demands it, the legislative judgment is conclusive both as to the necessity for making the grant and the amount of service to be

rendered; and the courts have no power to interfere, however inadequate the consideration or unreasonable the grant may appear to them."

Godson v. *Winchester, etc., Assn.*, 12 Bush, 114, quoted and approved,

Louisville Gas Co. v. *Citizens Gas Light Co.*, 115 U. S., 700.

"But whether such contract shall be made or not is exclusively for the consideration of the state. * * * Nor can the people or their representatives by any act of theirs afterwards impair its obligation."

Ohio Life Ins. & Trust Co. v. *Debolt*, 16 How., 428, quoted and approved,

N. O. Gas Light Co. v. *Louisiana Light, etc., Mfg. Co.*, 115 U. S., 650.

See, also,

New Orleans Water Works Co. v. *Rivers*, 115 U. S., 674.

Budd v. *State of New York*, 143 U. S., 517.

Brass v. *State of North Dakota*, 153 U. S., 391.

New York, Lake Erie & W. R. Co. v. *Penna.*, 153 U. S., 626.

IV.

THE CONSTITUTIONAL PROHIBITIONS FORBID ANY IMPAIRMENT WHATEVER OF THE OBLIGATION OF CONTRACTS.

Dartmouth College v. *Woodward*, 4 Wheat., 514.

Bronson v. *Kinzie*, 1 How., 319.

McCracken v. *Hayward*, 2 How., 608.

"Any enactment, from whatever source originating, to which a state gives the force of law is a statute of the state within the meaning of the clause cited relating to the jurisdiction of the court.

"The constitutional provision prohibiting a state from passing a law impairing the obligation of contracts equally prohibits a state from enforcing as a law an enactment of that character, from whatever source originating."

Williams v. *Bruffy*, 96 U. S. 176, 183.

N. O. Water Works Co. v. *La. Sugar Ref. Co.*, 125 U. S., 18.

4 Thompson on Corp., Secs. 5427–8.

The ordinance complained of, which was held valid by the Supreme Court of Illinois, was but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and was therefore in legal intendment the equivalent of laws enacted by the state itself

City Ry. Co., v. *Citizens St. R. R. Co.*, 166 U. S., 557.

Penn. M. L. Ins. Co. v. *Austin*, 168 U. S., 685.

"An unconstitutional law is not a law. It confers no rights; it affords no protection; it imposes no duties; it creates no office; it is in legal contemplation as inoperative as though it had never been passed."

Norton v. *Shelby Co.*, 118 U. S., 425, 442.

ARGUMENT.

I.

The essential points upon which the decision of this case must turn, as it seems to us, are comprised within comparatively narrow limits. If this record discloses no contract or vested rights on behalf of the plaintiff in error, then it can have no standing here, however important may be the questions involved in the case and however sweeping and far-reaching may be the consequences of the decision of the Supreme Court of Illinois from which this writ of error is prosecuted.

If, however, it does appear that the plaintiff in error is possessed of contract or vested rights; that such rights were specially set up and claimed under the constitution of the United States; and that the decision of the Supreme Court of Illinois was against such rights and in favor of the validity of the ordinance to which the force of law was given, the exercise whereof impaired such rights of the plaintiff in error, then this case must be reversed.

There can be no doubt, in our view, that such rights were claimed by plaintiff in error and specially set up and claimed under the constitution of the United States; nor can there be any doubt that the decision of the Supreme Court of Illinois was adverse to the claim of right of the plaintiff in error, and that it did give force and validity to the law or ordinance impairing the obligation of the contract and vested rights thus claimed and set up.

The facts show that a contract was made.

The facts, conclusively established, present the case of a municipality empowered by statute to contract for a water supply for public use, which passed an ordinance in the usual form granting to H. E. Keeler, the grantee therein named, the power and right to erect the system of water works described in the ordinance, and to operate the same for the statutory period of thirty years. In addition to the duty to supply water, as therein provided, the grantee was required to furnish steam to the extent of ten horse power without additional compensation.

The grantee did not have the means to build and equip the works contemplated by the ordinance, and this was understood by the municipality and its representatives, and it was also understood that the ordinance should be used by him as a basis to negotiate for the necessary capital. The rates for water to be paid by such of the inhabitants of the village as should become consumers of a domestic supply of water from the contemplated water works constituted a very material part of the income to be derived from such water works when erected and put in operation. The income expected to be derived from this source formed a material part of the basis of the negotiations so entered upon by the grantee.

Within the sixty days which had been given to him by the ordinance for that purpose, the grantee carried his said negotiations to a successful issue and obtained the necessary capital. Thereupon, he accepted the ordinance and became bound to carry out its terms on his part to be performed during the entire contract period of thirty years.

The ordinance expressly ran to him and to his successors and assigns. Shortly after the acceptance of the ordinance, and during the same month, the Rogers Park Water Company was organized under the general incorporation statute of Illinois (R. S., Chap. 32), and it subsequently and during the same month became assignee of said grantee and thereafter built the water works provided for in the ordinance, and which were duly tested and accepted by the village, and which it has ever since operated.

The extensions of mains provided for in the ordinance were made by the company when ordered by the village, and, in continuation, by the city after annexation, and the hydrant rentals upon both the original system and such extensions have been paid by the village and by the city. The extensions of mains thus ordered and laid were about thirteen miles, while the original system was but about five miles.

Everything required by the ordinance has been done by the grantee and by the company as assignee and successor to H. E. Keeler, the grantee named in the ordinance.

The Village of Rogers Park had the right to procure a supply of water for the use of said village and of its inhabitants.

Such use of water is a public use, and this is equally true whether the water is employed in extinguishing fires, flushing sewers and for like purposes, or consists in furnishing an abundant supply of pure, wholesome water to the inhabitants of the municipality for domestic and individual use. Safety, health and convenience are the

objects in each case, and it is solely with reference to the individuals composing the community, or who may be affected thereby, that these objects are sought.

The right to procure a supply of water for public use has been held to exist in a municipality as implied from the police power and for the preservation of health; and that such supply of water may be procured by contract as a sanitary and police regulation.

> "A city having power to pass ordinances respecting the police of the place, and to preserve health, is authorized, as a sanitary and police regulation, to contract to procure a supply of water by boring an artesian well, or otherwise, on the square, and is the judge of the mode best adapted to accomplish the object."
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> 1 Dillon on Mun. Cor. (3d Ed.), Sec. 146, citing *Livingston* v. *Pippin*, 31 Ala., 542; *Indianapolis* v. *Indianapolis Gas Co.*, 66 Ind., 396, approving text; *Rome* v. *Cabot*, 28 Ga., 50; *Hale* v. *Houghton*, 8 Mich., 458.

> "To the extent necessary to execute the special powers and functions with which it is endowed by its charter, there is, indeed, an implied or incidental authority to contract obligations and to sue and be sued in the corporate name." Do., Sec. 443.

In Illinois, not less than elsewhere, the necessity of an adequate supply of water to municipalities to promote public safety, health, decency and comfort, has been recognized. The Illinois statutes cited (ante, p. 16) provide, Sec. 1:

> "That in all cities, incorporated towns and villages where water works have been or may hereafter be constructed by any person or incorporated company, the city, town or village authorities in such

cities, incorporated towns and villages may contract with such person or incorporated company for a supply of water for public use for a period not exceeding thirty years."

Sec. 2. "Any such city or village so contracting may levy and collect a tax on all taxable property within such city or village, to pay for the water so supplied."

Chap. 24, Art. X, Sec. 1, Ill. R. S., provides that:

"The city council or board of trustees shall have the power to provide for a supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs or water works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; and also to prevent the unnecessary waste of water; to prevent the pollution of the water and injuries to such wells, pumps, cisterns, reservoirs or water works."

These two acts are *in pari materia* and should be construed together.

We have already noted the language of the legislature in the act of April 22, 1871, which refers to municipalities which "have established water works for the supply of water to the inhabitants thereof" (ante, p. 17). Notwithstanding the different verbiage, all these acts refer to exactly the same thing.

The supply of pure, wholesome water to the inhabitants of a city is a public purpose and a public use.

We contend that what the municipality was and is empowered by law to do is to provide a supply of water for the use of its inhabitants, either directly through its own

system of water works or, at its option, indirectly by contract with a person or corporation, and that the price to be paid by the inhabitants who desire to become consumers of water thus provided stands on just the same footing and is equally within the power of the municipality, *and for the same reasons*, as the price to be paid for so-called hydrant rental by the municipality itself.

The entire supply of water which cities can be legally authorized to provide must be of a public nature.

The supply of water to each of the inhabitants of the city for private and individual use is a public supply and a public use in the fullest and most ample sense. Indeed, such purposes as fire protection, the flushing of sewers, washing streets, and the like, to which uses hydrants are devoted and which provide the basis upon which all payments by the municipality rest, seldom involve a tithe of the general interest directly embraced in the domestic supply of water to each inhabitant for private and individual use.

"Private" means in its origin, separate, apart; concerning an individual only. "Public" refers to all the people, although it is applied to any sufficiently large fraction.

There is a great deal of misapprehension from which courts have not at all times been exempt in regard to the meaning of public as compared or contrasted with private interests and purposes. The impression quite commonly prevails that the one is narrow and selfish, if not even debasing; while the other is correspondingly lofty and ennobling. A very little analysis, however, will suffice to demonstrate that every so-called public interest, use or purpose which involves material considerations is strictly

private, personal and selfish with each individual affected. To this there is no exception, and from it there is no escape. When all is done and said it merely becomes a question of the greatest good to the greatest number in regard to interests equally private, personal and selfish, whether those of a consumer of water who pays or of a stockholder in the water company who receives the price or rate for water. Each may become the victim of oppression in regard to such interest. The real and only difference in all such cases where material interests are involved consists in the number of individuals whose interests are affected, and not in any diversity in the kind of interest; for it makes no difference in this respect whether water or bread is the article sold, and buyer and seller are alike moved by self interest.

Our claim is, therefore, that so far as the nature of the enactment or the power of the city are concerned, there is no difference between the hydrant rate and the rate to consumers provided for in different sections of these ordinances

The village had the right to decide whether it would supply water by means of a contract.

Had the Village of Rogers Park not been disabled by lack of means to raise the necessary money, it had the power to establish, erect and operate municipal water works. As we have already seen, this right was directly and explicitly conferred by statute. In that case its right to prescribe the rates at which water must be paid for by its inhabitants is unquestioned.

It is admitted by these pleadings that the village lacked the means to supply water directly. Had the action of

the municipality been dictated solely by its views of expediency, however, it would not change the principle for which we contend. The policy adopted by the village in determining to provide a water supply by private contract was one upon which its discretion and action must be uncontrolled and final.

1 Dillon Mun. Corp. (3rd Ed.), Sec. 94.

The power of the legislature of the state had been delegated to the municipality, and within the limits of the statute the power of the village to make a contract and fix rates for water was just the same as that originally possessed by the legislature itself.

Under the constitution of 1870 the entire legislative power to provide water for the use of municipalities and their inhabitants had been conferred in Illinois, by statute, on the municipalities themselves. This is in accordance with the wise and settled policy of local self-government, which has prevailed in this state from the beginning, and that such is the case plainly appears from the language of the acts.

Had a municipal plant been erected, the right of the village to fix rates for water to be collected from private consumers is not questioned. Had the village chosen so to do, it might have provided for a supply of water, to be paid for by itself, in any form which might be agreed upon, as, for instance, by meter rates, and it, in turn, could have collected the water rates which it prescribed from the individual consumers. Instead of doing this, it provided that the grantee under the ordinance should collect directly from the individuals who became consumers of water to be supplied by the contemplated water sys-

tem. The right to fix the rates to be paid by individual consumers of water as a part of the contract by which a water supply is obtained through water works erected under such contract by private persons seems to us to be equally clear with the right of the village to fix such rates, had it chosen to make the collections itself.

Good faith requires that the contract be kept.

The ordinance of November 12, 1888, was, in form and upon its face, an agreement and contract with the grantee therein named to erect water works and provide a supply of water for the village and its inhabitants. Prior to its acceptance by such grantee, however, it was in fact a mere proposition for a contract made by the village to him, which he was entirely free to reject. Sixty days was given to him by the terms of the ordinance to consider whether he would accept it or not, and the pleadings show that this time was given to him for the express purpose of enabling him to ascertain whether the terms of the ordinance, and the payments for water therein provided for, were sufficiently favorable to induce the investment of money in the erection and operation of the proposed water works. The village board of trustees passed the ordinance and sent the grantee out with it to try to obtain the necessary capital upon the faith of the rates for water therein fixed and prescribed.

The payments for water comprise the only inducement to invest the large amount of capital required for the contemplated water system, and it was solely upon the faith of the ordinance fixing the rates for payment therein prescribed that the grantee was able to obtain the money necessary for that purpose. Having done this, he ac-

cepted the ordinance and it became a binding contract enforceable by either party to it. The village could compel Keeler to cause the water works to be constructed and operated as prescribed in the ordinance, and Keeler on his part had the right, upon performance by him, to compel the village to carry out what it had thus contracted to do, when the water works in question had been constructed and were put in operation by the grantee and his assigns. What element was lacking to make a complete contract fully performed on the part of the grantee in the ordinance?

There is no constitutional prohibiton.

An attempt has heretofore been made to invoke the provisions of the constitutition of the State of Illinois which prohibits an irrevocable grant of special privileges by the legislature to cut down the provisions of the ordinance of November 12, 1888, which fixed the rates to be charged and paid for water during the ordinance period of thirty years.

The Bill of Rights, Art. II, Ill. Const. of 1870, provides in section 14 as follows:

> "No *ex post facto* law or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed."

The claim is made that the attempt to fix rates to be paid by private consumers for water for the period of thirty years, or for any other period, is within the prohibition of the words "any irrevocable grant of special privileges."

The first answer to this contention is found in the fact that no such construction has ever been given to the

language in question, although the constitution containing it has been in force for a generation.

The second answer is that the meaning contended for proves too much. It would be equally applicable to any grant or contract whatever, and this could never have been the true intent of the constitution. Such a prohibition would equally apply to the right to operate water works, or to continue the supply of water, or even to retain the mains in the streets for any definite period of time whatever. All rights would then be subject to immediate revocation. We respectfully submit that such a meaning was never seriously considered. It would prove far too precarious a basis for an investment of capital in costly and permanent improvements, the construction of which was of vital necessity to the village and its inhabitants, which it was unable otherwise to procure and which improvements are of little or no value for removal.

The grant was not irrevocable within the meaning of the constitution.

We insist that the grant is subject to three important qualifications which prevent it from being irrevocable within the meaning of any prohibition contained in the constitution.

First. The rights of the grantee could be terminated at any time by condemnation proceedings and the ascertainment of the fair value of the property by any court of competent jurisdiction. By these means, whenever the municipality was able to pay for the property it was entitled to purchase it, and it had the right under the law to operate the water system immediately upon such purchase.

Second. The option by the village to purchase said works was set forth in the title to the ordinance and appears in section 8. The village was given the right to purchase said system of water works at the end of the first ten years, and of each succeeding five years thereafter at an appraised valuation to be fixed by three arbitrators to be chosen as provided in said section.

Third. At the end of the thirty years comprised in the ordinance period, the water works must be removed or the property must be abandoned, for all contract rights then expire by limitation and cease.

It would be scarcely better than a confidence game practiced by the municipality if, after so great a lapse of time by a new and violent interpretation of the constitution, it should practically confiscate all property employed in public or quasi-public use.

The reservation in the statute on corporations does not apply.

A further claim has been advanced by defendant in error in this case in opposition to the rights of plaintiff in error, but for the reasons hereinafter stated we do not think the claim can be sustained. It has been insisted that the plaintiff in error is subject to any statute which the legislature of Illinois may at any time deem advisable to adopt, based on the reservation contained in chapter 32, section 9, under which act the plaintiff in error was incorporated. That section, omitting the proviso, which does not bear upon the questions here involved, is as follows:

> "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and pro-

visions shall be binding on any and all corporations formed under the provisions of this act."

1 S. & C. R. S., 2nd Ed., p. 1006.

Defendant in error contends that, under this provision, the right was reserved to reduce the rates for water which might be charged by plaintiff in error, and that the act of the Illinois legislature of 1891, cited ante (p. 17), provides a sufficient foundation and legal basis for the ordinance of the City of Chicago of October 4, 1897 ante (p. 18), reducing those rates.

In *City of Danville* v. *Danville Water Co.*, 178 Ill., 299, 306, some weight seems to have been given to this point, and similar language is repeated in the case now on hearing by the Supreme Court of Illinois in *Rogers Park Water Co.* v. *Fergus*, 178 Ill., 571, 576-7.

We think it will only be necessary to call the attention of the court to the facts in this case to dispose of the objection. The grantee under the ordinance of November 12, 1888, was a natural person, and said ordinance was accepted by him. Said Rogers Park Water Company, the plaintiff in error herein, was not then organized and had no corporate existence whatever. The only relations which exist, or which have ever existed between said corporation and the Village of Rogers Park, or the City of Chicago, are those which arise out of the assignment by said grantee to the plaintiff in error of his rights as such grantee under said ordinance. That acceptance was made January 9, 1889, which was the date of the acknowledgment, the acceptance being dated the previous day. When it was accepted the ordinance first took effect. Until then it had remained a proposition merely. Upon acceptance it became completely effective and enforceable.

The plaintiff in error occupies the same footing as Keeler, the grantee, in whose shoes it stands.

The corporation owed no duty to discharge any function whatever until it assumed compliance with the ordinance in question, and this duty devolved upon it because it became assignee of the grantee under that ordinance. Its charter, as such, had merely given it the right to exist, and had created in it the capacity to become such assignee; but that charter gave it no power to enter upon such business save under the ordinance.

The measure of the duty of the plaintiff in error in regard to all the questions which arise upon this record must be found in the ordinance of November 12, 1888, which it voluntarily assumed after said ordinance had been accepted by the grantee, and the legal consequences which result from such assumption, and not elsewhere, as it seems to us.

We respectfully ask the court how and why any different measure of right, privilege or liability can exist in regard to the plaintiff in error, so far as concerns all ordinance questions, from what would have been the case had the grantee, Keeler, pursued his legal rights as grantee under the same ordinance, and remained the sole possessor of the rights and privileges thereby conferred?

To hold otherwise would be to deny to plaintiff in error the equal protection of the laws granted by section 1, article XIV, of the constitution of the United States.

Honesty is the best policy for municipalities as well as for individuals.

The practical value of honest dealings between the people acting through their governmental agencies and those to whom application is made for the construction and operation of public utilities ought not to be overlooked. To-day, in Illinois, owing to the decisions which have been rendered in the *Danville* and *Rogers Park Water Company* cases, paralysis has fallen upon the erection of water works by private capital to supply municipalities and their inhabitants with water. No matter what may be the necessities of the people nor how great their willingness to give guaranties of reasonable and adequate returns, no capital can be induced to invest in so precarious a venture. The people have been disabled to make a binding contract, and none dare deal with them.

So far as this relates to water works erected since the act of 1891, and the construction of that act with reference to such works, we may dismiss it as a matter with which we have nothing to do; but when practical repudiation is attempted by decisions which in effect make that statute retroactive in character and all municipal obligations are weakened and all municipal credit is shaken in consequence, we may well call a halt and ask to revert to the old maxim which teaches that "honesty is the best policy" after all.

The reservation contained in the statute on corporations does not apply.

But even if the plaintiff in error had been named as grantee in the ordinance, we fail to perceive why it could not and would not have stood in exactly the same position

as a natural person in the same circumstances. In other words, we contend that any discussion of the reservation contained in Ch. 32, Sec. 9, Ill. R. S., is quite beside the question here involved, which has to do solely with the provisions of the ordinance granting the right to erect and operate the water works therein named and the power of the municipality so to contract.

As above stated, the entire legislative power to provide water for the use of municipalities and their inhabitants has been conferred by statute on the municipalities themselves.

Corporate capacity alone is conferred by incorporation under the general statutes of the state, while the grant of the franchise to erect and operate water works, including the right to lay mains in the streets, must be conferred by the municipality itself through appropriate ordinances. We fail to see how the construction of the statute is at all involved in this case.

The case does not involve the appropriation of water.

It will not be requisite for us to do more to distinguish the case at bar from those which have to deal with an appropriation of water from a source of limited supply than merely to say that here the source of supply contemplated was Lake Michigan, upon which the Village of Rogers Park fronted, and which provided an unlimited amount of water.

Principles relating to the use which may properly be made of a limited amount of water, the appropriation of which must give rise to a monopoly in an article necessary to life and restrictions imposed for that reason manifestly have no application here. This discriminates

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a large proportion of all the decisions which have arisen in the arid regions of the United States, including California, where the rainfall in large tracts is generally insufficient and the conservation of water becomes a matter of prime importance.

We believe that this court is too familiar with its own decisions to make it necessary to extend this brief by quotations from the cases cited which seem to us to be decisive of this case.

It seems to us that the decision of the Supreme Court of Illinois from which this writ of error has been prosecuted is destructive in its character and manifestly erroneous and that it ought to be reversed.

Respectfully submitted.

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